

WHITE TIGER GRAPHICS, INC.

PURCHASE ORDER NO. F 7163

VABCA-7208GPO

Anthony Hawks, Esq., Alexandria, Virginia, for the Appellant.

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OPINION BY ADMINISTRATIVE JUDGE SHERIDAN

BACKGROUND

This timely appeal was taken from a June 18, 2003 U.S. Government Printing Office (GPO) contracting officer's final decision partially terminating for default White Tiger Graphics, Inc.'s (White Tiger's or Appellant's) Purchase Order No. F 7163 (Contract), also referred to as Jacket No. 733-703. The parties have elected to submit this appeal for decision on the record in accordance with Rules 11 and 13. The Public Printer, by Interagency Agreement dated June 7, 2004, designated the Department of Veterans Affairs Board of Contract Appeals

(VABCA or Board), to hear appeals of final decisions by GPO contracting officers.

The record before the Board consists of the pleadings; the Rule 4 Appeal File (R4) submitted by the GPO, tabs A through QQ; the Rule 4 Appeal File as supplemented by the Appellant (R4), tabs RR to VV; five copies of a book titled "A History of the Savannah River Site" (Exhibit (Exh.) G-1 through G-5); Respondent's Brief (Resp't Br.) containing the Declaration of Calvin Adgerson (Adgerson Decl.); Appellant's Cross-Motion for Summary Relief (Appellant Br.) containing the Declaration of Brad W. Johnson (Johnson Decl.); Appellant's Statement of Uncontested Facts (Appellant Statement); Respondent's Reply Brief (Gov't Reply); and Appellant's Opposition to Respondent's Brief (Resp't Reply).

Both entitlement and quantum are before the Board.

APPLICABLE CONTRACT PROVISIONS

14. Inspection and Tests.

(a) *Definition.* "Supplies," as used in this clause includes but is not limited to raw materials, components, intermediate assemblies, end products, and supplies by lot.

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(c) The Government has the right to inspect and test all supplies called for, to the extent practicable, at all places and times, including the period of manufacture, and in any event before acceptance. The Government shall perform inspections and tests in a manner that will not unduly delay performance and assumes no contractual obligation to perform any inspection and test for the benefit of the contractor unless specifically set forth elsewhere.

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(h) If the contractor fails to promptly remove, replace, or correct rejected supplies that are required to

be removed or to be replaced or corrected, the Government may either:

- (1) by contract or otherwise, remove, replace, or correct the supplies and charge the cost to the contractor, or
- (2) terminate for default as provided in the Default clause.

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(j) The Government shall accept or reject supplies as promptly as practicable after delivery, unless otherwise provided in the contract. Government failure to inspect and accept or reject the supplies shall not relieve the contractor from responsibility, nor impose liability on the Government, for nonconforming supplies.

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(k) Inspections and tests by the Government do not relieve the contractor of responsibility for defects or other failures to meet contract requirements discovered before acceptance. Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract.

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15. Warranty.

(a) *Definitions.* As used in this clause –
“Acceptance” means the act of an authorized representative of the Government by which the Government assumes for itself, or as an agent of another, ownership of existing supplies, or approves specific services as partial or complete performance of the contract.

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20. Default.

(a)(1) The Government may, subject to paragraphs (c) and (d) below, by written notice of

default to the contractor, terminate the contract in whole or in part if the contractor fails to –

- (i) Deliver the supplies or to perform the services within the time specified or any extension thereof:
- (ii) Make progress, so as to endanger performance (but see subparagraph (a) (2) below): or
- (iii) Perform any of the other provisions.

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(b) If the Government terminates in whole or in part, it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminate, and the contractor will be liable to the Government for any excess costs for those supplies or services.

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(f) The Government shall pay the contract price for completed supplies delivered and accepted. The contractor and Contracting Officer shall agree on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property. Failure to agree will be a dispute under the Disputes clause.

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(g) If, after termination, it is determined that the contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

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24. Payments on Purchase Order.

(a) Payment will be made to the contractor upon submission of a proper voucher (Standard Form 1034, Public Voucher for Purchases and Services Other than Personal; GPO Form 2511, Print Order; or the contractor's own invoice).

GPO CONTRACT TERMS, Contract Clauses, ¶¶ 14, 15, 20, and 24, GPO Publication 310.2 (Rev. 5-99).

FINDINGS OF FACT

The following findings of fact are made for the purposes of this decision only.

The original requirements for GPO Jacket No. 733-703 called for the printing and binding of 2,000 copies of a hardcover library quality publication titled “A History of the Savannah River Site” marking the 50th anniversary of this Department of Energy (DOE) site. (R4, tabs A and B) The binding specifications required the books to be “case bound” (*i.e.*, the pages were to be sown in the back and bound in the manner of a hardcover book). (R4, tab A)

On May 2, 2002, Gary Bush, a contracting officer (CO) at the ordering agency, GPO, Atlanta Regional Printing Procurement Office (ARPPPO), awarded the Contract in the amount of \$64,000, to Appellant, White Tiger Graphics, Inc. (White Tiger). (R4, tab B) The customer agency was DOE/Westinghouse Savannah River Company, Savannah River Site (SRS). (R4, tab A) A supplemental agreement, Contract Modification No. 1, was entered into on June 18, 2002, by White Tiger and ARPPPO, increasing the Contract by \$5,344.50 to reflect a paper change that SRS wanted. (R4, tab F) On June 19, 2002, Contract Modification No. 2 was issued decreasing the Contract by \$2,575.00 to reflect the GPO’s agreement to accept output digital color contact proofs instead of the specified Matchprint proofs. (R4, tab G) Modification No. 3 was issued on July 29, 2002, to extend the original delivery date from July 8 to July 30, 2002, and to permit partial delivery of 200 books on July 30, with the balance of the books to be delivered by July 31, 2002. (R4, tab M)

Throughout the pendency of the Contract, White Tiger submitted numerous books to SRS for quality inspection, resulting in the identification of several problems with the printing. Lengthy discussions were held between CO Bush, Brad Johnson, the President of White Tiger, and representatives from SRS, regarding how the books were deficient and whether they could be repaired to meet Contract specifications. Several of these books were sent back to White Tiger for repair.

Ultimately, White Tiger arranged with its bindery, Hiller Industries, to ship 2,027 books by August 2, 2002, as follows:

07/18/02	19	advance copies to DOE, Savannah Rive Site
07/29/02	207	books to DOE, Savannah River Site
08/02/02	15	books to Library of Congress
08/02/02	843	books to DOE, Savannah River Site
08/02/02	630	books to GPO, Jackson Alley, Washington, DC
08/02/02	300	books to GPO, Document Warehouse, Washington, DC
08/02/02	<u>13</u>	quality assurance samples to GPO, Washington, DC
	2,027	total books shipped

Johnson Decl. at ¶5.

Delivery occurred and the GPO, after deducting a prompt payment discount, paid White Tiger the total contract amount of \$65,434.11 by electronic transfer on August 28, 2002. According to Mr. Johnson this payment represented the “full and final payment” of the Contract. Johnson Decl. at ¶6.

Following delivery, a quality assurance check was begun, and on September 13, 2002, a Notice of Quality Defect (QD) was issued, noting:

QA [quality assurance] *of total job* indicated 138 books damaged in excess of original QD letter. Damages included: color variation on various photographs, connected signatures (poor trim), dog-ears, extraneous marks, pages/sections not in binding, loops signature stitch loops, wrinkled pages, no full bleed on some

photo pages, pages duplicated in books, torn page corners, hard cover damage, glue in seam. Shipping damage (smashed corners) was noted on 2 boxes upon receipt, and some boxes lacked any packing materials (reported previously).

(R4, tab Q) (emphasis added). The QD requested that White Tiger “[r]epair or replace all books damaged in excess of the original acceptance.” (Id.)

CO Bush spoke to Mr. Johnson about the deficiencies and notes on October 14, 2002, that Mr. Johnson was developing a delivery date for the 138 deficient books and would get back to him. (R4, tab Q) Ultimately, on October 18, 2002, Modification No. 1 was issued by CO Bush noting:

One hundred and thirty-eight books delivered with color variation on photographs, signatures trimmed poorly/connected, loose signatures stitched in looks, pages dog-eared, extraneous marks found, loose binding, wrinkled pages, duplicate pages, damaged covers, glue in seams, smashed corners and poor packing.

One hundred and thirty-eight books are to be delivered in strict accordance with the Contract to the ordering agency by October 28, 2002.

(R4, tab R) (It is not clear from the record why this document was titled Modification No. 1 instead of No. 4, since Modifications No. 1 through 3 had already been issued.)

White Tiger arranged to ship 87 “make-up” books on October 25, 2002, to SRS to replace a portion of the 138 previously rejected books. (R4, tabs S and T) It appears from the record that 51 more books were shipped to SRS on November 12, 2002. This brought the total number of “make-up” books provided by White Tiger to the required 138. (R4, tab U) Mr. Johnson told CO Bush on November 11, 2002, that the GPO could destroy the original 138 deficient books, and CO

Bush passed this information on to Stephanie Doetsch one of GPO's points of contact at SRS. (R4, tab T)

By an email dated November 7, 2002, Ms. Doetsch indicated to CO Bush that SRS had 87 books and had started the QA process. (R4, tab U) In a telephone conference conducted on December 4, 2002, CO Bush records that he "[p]ut [Mr. Johnson] on notice that we have binding problems." The record does not identify the group of books to which the CO referred. (R4, tab V) A letter was sent to White Tiger on December 13, 2002, referencing a telephone conversation on December 12, "related to the forthcoming complaint," and noting that "the ordering agency is reviewing the books for defects, to include binding issues. Once the findings are available, I will contact you." (R4, tab W)

In a telephone conversation on January 29, 2003, CO Bush informed Mr. Johnson that "there were 208 bad books with bindery problems." (R4, tab X) White Tiger wanted the opportunity to repair the books because Mr. Johnson believed it would cost \$20,000 to reprint. CO Bush checked with SRS's Ms. Doetsch and SRS was willing to allow White Tiger to attempt to repair the books, but CO Bush told Mr. Johnson that "the bottom line is they are responsible and if SRS would not accept [the repaired books], [White Tiger] has to go back to press." (R4, tabs X, and BB)

After seeing samples of the repaired books, GPO and SRS representatives indicated that the repaired books still did not meet Contract requirements. (R4, tabs Y and Z) Mr. Johnson continued to assure CO Bush and Ms. Doetsch that the books could be fixed. (R4, tab AA) After looking at more repaired books, CO Bush observed that the books were still "substandard." (R4, tab AA)

On April 8, 2003, CO Bush issued Modification No. 4 directing White Tiger:

You are to return to press and reprint and bind 208 copies. Complete delivery is to [be] made to the ordering agency by May 23, 2003.

This decision is a final decision of the Contracting Officer, made pursuant to article 5, "disputes", of Contract Clauses in the GPO Contract Terms (Pub. 310.2), which is part of the contract. It shall be final and conclusive as provided therein, unless within 90 days for the date of receipt of this decision, a written notice of appeal, addressed to the Board of Contract Appeals, is mailed or otherwise furnished. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number.

In connection with any appeal proceeding, you shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(R4, tab EE)

SRS received White Tiger's delivery of 275 books on May 27, 2003. On June 12, 2003, Ms. Doestch sent a memorandum to CO Bush attaching a Notice of Quality Defects form on the delivered books noting the covers were trimmed smaller than the Contract specifications, the green or orange residue complained about in the September 13th defect letter remained on 28% of the books, pages were dog-eared on 8% of the books, and some were scuffed. (R4, tab HH) At his request, CO Bush was sent 13 random samples of the books. Upon inspection, he noted that the sample books were "[t]rim[ed] to 8 5/8" x 9 3/4" instead of 9" x 11". (R4, tab II) On June 16, 2003, CO Bush requested the GPO Contract Review Board's permission to "terminate White Tiger for partial default on subject order," noting:

Every effort was made to work with the contractor related to late delivery and quality issues over a period of months.

By letter, attachment 3, dated February 3, 2003, the contractor was required to furnish the ordering agency with not less than six repaired books due to binding issues, which included pages that were separating from the bind. The contractor was put on constructive notice that a reprint would be required if the repaired books were rejected. Five of the six books were rejected and the contractor was instructed to reprint and bind 208 books with delivery by May 23, 2004, attachment 4.

A complaint, attachment 5 was received from the ordering agency. The complaint states that the text pages were trimmed to 8-11/16" x 9-3/4" instead of 9" x 11" as required by the contract. Color issues were found on pages 56 and 69. Dog-eared pages and scuffing were found as well. In addition, the complaint stated that the books were not case bound and shrink film wrapped as required.

(R4, tab JJ) The GPO Contract Review Board concurred with the default termination on June 17, 2003. (R4, tab KK)

A Notice of Partial Termination for Default was issued on June 18, 2003, by CO Bush stating:

You are notified that your contract identified as Purchase Order F 7163, Jacket 733-703, is hereby terminated immediately for partial default because you failed to fulfill the requirements of the contract.

Two hundred-eight copies were to be reprinted in strict accordance with the contract. Instead, the prior rejected order was unsatisfactorily repaired and delivered to the ordering agency. The books were trimmed greater than 1/8" under the trim size in both dimensions. Color

issues were found on pages 56 and 69. Dog-eared pages and scuffing were found as well.

You are also advised that the same or similar items terminated may be reprocured against your firm's account, on such terms and in such manner as the contracting officer deems appropriate. In that event, your firm shall be held liable to the Government for any excess costs. The Government reserves all rights and remedies provided by law and under the contract, in addition to charging excess costs. This is the final decision of the contracting officer.

(R4, tab LL)

On June 19, 2003, CO Bush requested that GPO ARPPO Financial Management withhold \$25,000 from White Tiger for reprocurement costs until the reprocurement contract was awarded. (R4, tab MM) White Tiger, by Mr. Johnston, on June 27, 2003, appealed the termination for default and withholding of the \$25,000 to the GPO Board of Contract Appeals. (R4, NN) CO Bush orally contacted several printers seeking bids for the reprocurement contract. (R4, tab RR) Five written bids were received, ranging from a low of \$44,900.00 to a high of \$94,050.00. (R4, tab SS) On July 1, 2003, Purchase Order No. F 4483, Jacket 741-865 was issued to The R.L. Bryan Company in the amount \$44,900.00 for 209 copies of the book. (R4, tab UU)

CO Bush wrote White Tiger on July 11, 2003, informing them that they were liable for the 209 books reprocured at the cost of \$44,900.00 and that "[i]mmediately upon receipt of this notice, you are to reimburse the Government the amount of \$44,900.00." (R4, tab PP) On that same date, CO Bush asked GPO ARPPO Financial Management to recover a total \$44,900.00 in reprocurement costs from White Tiger. (R4, tab OO) Mr. Johnson wrote CO Bush on July 18, 2003, that White Tiger had filed for bankruptcy in the United States Bankruptcy

Court for the Northern District of Alabama. (R4, tab QQ) On October 24, 2003, the Bankruptcy Court modified the automatic stay to allow GPO's collection from White Tiger of the total excess procurement costs of \$44,900.00 by setoff and issued a Consent Order authorizing White Tiger to proceed with this appeal. (R4, tab VV) Collection of the excess procurement costs was completed on January 8, 2004. Respondent's Brief, p. 5; Johnson Decl. at ¶ 8. The parties have elected to submit this appeal for decision on the record in accordance with Rules 11 and 13.

CONTENTIONS OF THE PARTIES

GPO argues that the Appellant's failure to meet contract specifications justified the CO's decision to reject 208 books and partially default the Contract under the Default Clause. GPO also argues that, since White Tiger's failure to reprint was a legitimate reason for partial default, Appellant is liable for excess procurement costs of \$44,900.00. Appellant counters that the partial default was improper because GPO had already accepted the books and was thereby precluded from issuing a partial default. White Tiger further argues that the GPO was limited to its warranty rights but forfeited any warranty rights it might have had with respect to the 208 books by allowing the contractually established 120 day warranty period to elapse. The GPO counters by asserting that "Appellant's history of inadequate and rejected performance . . . [its] admission that it did not follow the reprint order, and the fact that the repaired books did not meet the Contract size specifications, tolled the expiration of the warranty period so that CO's final decision was made within the time limits set forth in the Contract's Warranty Clause."

DISCUSSION

The principal issue we address in this case is the propriety of GPO's partial termination of the Contract for default. Appellant does not deny that it failed to deliver 208 books meeting the Contract specifications. Nor does it deny that it was given several chances by the GPO to correct various deficiencies and deliver 2,000 books that were acceptable to the GPO. It is clear that up to the termination Appellant tried to remedy any defects the GPO raised regarding the books, short of reprinting.

When issuing the partial default termination, the GPO asserted the termination was justified because of Appellant's failure to follow the directive to reprint 208 defective books. In response to the GPO's position, Appellant posits that on August 28, 2002, GPO made full and final payment of the Contract in the amount of \$65,434.11, thereby accepting the books, and triggering the 120 day post-acceptance warranty period established by the Contract. It argues that, inasmuch as the GPO did not raise the deficiencies in the 208 books until after the expiration of the warranty period, the GPO relinquished any remedies it might have had under the Warranty Clause.

Pursuant to the terms of this Contract, '[a]cceptance' means the act of an authorized representative of the Government by which the Government assumes for itself, or as an agent of another, ownership of existing supplies, or approves specific services as partial or complete performance of the contract." Contract, ¶ 15. It is clear from GPOBCA precedent that payment does not necessarily infer acceptance of the delivered items. As the GPOBCA stated in *Wintech International, Inc.*:

When supplies are tendered to the Government pursuant to a contract, the Government ultimately must

accept or reject those supplies. Acceptance of the supplies, which may be explicit or implied, is understood to mean that title to the supplies has transferred to the Government and that the Government, except as noted above, may no longer reject them. The Executive Branch provides regulatory guidance on this subject, specifying that acceptance normally will follow “quality assurance actions” and “shall ordinarily be evidenced by execution of an acceptance certificate on an inspection or receiving report form.” GPO’s Printing Procurement Regulation [PPR] . . . is silent, however, as to how and when acceptance takes place. The only GPO guidance appears in its “Warranty” clause, where the term is defined for purposes of that clause as “the act of an authorized representative of the Government by which the Government assumes . . . ownership of existing supplies.”

Notwithstanding the absence of GPO regulatory provisions dealing explicitly with acceptance, it is nonetheless clear from the PPR and from GPO contract provisions that (1) quality assurance actions are expected to precede acceptance under GPO's contracting process also, and (2) payment to the contractor may also precede acceptance. In this regard, the PPR, which describes GPO’s quality assurance program . . . and GPO’s standard contract provisions . . . impose quality assurance requirements and procedures to ensure compliance with contract specifications. Under this program, GPO is expected to determine, before acceptance, whether delivered printed products are defective and, if so, whether they should be rejected or whether the contract price should be discounted. Moreover, under its “Payments on Purchase Order” clause . . . GPO pays its contractors upon receipt of contractor vouchers, which may precede quality assurance inspection, and which has led GPO on more than one occasion to assert that payment alone is not an indicator of acceptance.

While GPO obviously is entitled to some appropriate time to test and inspect supplies delivered under its contracts, and while under GPO contracts payment may not be an indicator of acceptance, acceptance cannot be delayed indefinitely. The Respondent is required to notify its contractors “promptly” if, under the “Inspection and Tests” clause, a product is to be rejected. If that notice is not provided, after some reasonable period of time acceptance may be deemed to have occurred as a matter of law. What is a reasonable time will vary with the circumstances. . . . In addition, regardless of the time involved, acceptance may result where the Government acts in a way that is inconsistent with the contractor’s ownership of the delivered supplies, most typically by retaining and using the supplies.

Wintech International, Inc., GPOBCA No. 15-95, 1998 WL 750865 (citations omitted).

The question of whether the GPO actually accepted all contract work ultimately becomes a question of fact, which Appellant bears the burden of proving. *Henry Angelo & Co., Inc.*, ASBCA No. 30502, 87-1 BCA ¶ 19,619. In cases like the one before us, we typically consider various items as providing indicia of acceptance of supplies. Acceptance of supplies can be reasonably inferred from pertinent documents including invoices, bills of lading, receiving reports, material acceptance and accounts payable reports, inspection reports, retention and use of delivered materials, and advices of payment of the contract amount. *Fairfield Scientific Corporation*, ASBCA No. 21,152, 78-1 BCA ¶ 12,869

The GPO neither specifically concedes nor denies that, when it took delivery of and made full and final payment of the Contract price it, was accepting the 2,027 books that were delivered. In responding to Appellant’s Warranty argument, GPO appears to concede that acceptance had occurred at

some point and refocuses its argument on its rightful use of remedies provided by the Warranty Clause of the Contract. Nevertheless, we are left to decide when the GPO accepted the 2,027 delivered books, and, most specifically, when it accepted the 208 books upon which it based its partial default termination.

The record before us is not a model of clarity in this regard. We note that during the pendency of this Contract none of the documents exchanged by the parties mentioned crucial terms such as “accept,” “reject” or “warranty.” It is undisputed that GPO and SRS took delivery of approximately 2,027 books shortly after they were shipped in late July and early August, 2002, and made payment in full on August 28, 2002. However, the record does not contain signed receipts, receiving reports or any other complete documentation evidencing actual delivery or receipt of the books. After deducting a prompt payment discount, GPO paid White Tiger the total contract amount of \$65,434.11 by electronic transfer on August 28, 2002. This also is undisputed, although the record contains no documents that confirms this information. The record is devoid of the typical documentation one would expect, such as an acceptance certificate or a form comparable to the DD Form 250, Material Inspection and Receiving Report, that formally confirms when the books were accepted. So too, there is no evidence in the record addressing if, or when, the GPO and SRS began using the books they had received.

The evidence does show that SRS conducted inspection(s) sometime between the delivery of the 2,027 books in late July and early August, 2002, and September 13, 2002, when a Notice of Quality Defect [QD] was issued noting, “QA [quality assurance] of total job indicated 138 books damaged in excess of original QD letter.” The notice cited color variation on photographs, signatures trimmed poorly, dog-eared pages, extraneous marks found, loose binding, wrinkled pages, duplicate pages, damaged covers, glue in seams, smashed

corners and poor packing. However, it is unclear whether the Appellant was provided a copy of the QD notice. The CO, at some point after the QD notice was issued, spoke to Appellant about the deficiencies, and on October 18, 2002, issued a written directive in the form of a Contract modification ordering the Appellant to deliver 138 books “in strict accordance with the Contract” to the ordering agency by October 28, 2002. Shortly thereafter, the Appellant told GPO it could destroy the 138 defective books.

Based on the record and circumstances before us, we find the September 13, 2002 notice as providing the most compelling evidence of the fact and scope of the GPO’s acceptance in the matter before us. That notice indicated a quality assurance check had been performed of the total job and 138 books were found to be defective books, which needed to be repaired or replaced. The quality assurance check was performed within a reasonable period of time given the circumstances, number and complexities of the books inspected. Thus, we find that the 138 defective books were properly rejected under the Inspection Clause at some undefined point at or after issuance of the September 13, 2002 QD notice, and certainly as of October 18, 2002, when the related contract modification was issued. Accordingly, the warranty began to run on the remaining 1889 books (2,027 delivered books less the 138 defective books).

Appellant proceeded to repair the 138 books, but the record is unclear as to its degree of success. The record shows that 87 replacement books were delivered around October 25, 2002 and SRS began a quality assurance check on November 7, 2002. Another 51 books were shipped to SRS on November 12, 2002. After that, the record does not address what happened to the 138 replacement books.

On January 29, 2003, approximately six months after initial delivery of the 2,027 books, five months after payment, and more than two months after

delivery of the 138 replacement books, the CO informed Appellant that there were 208 defective books “with bindery problems.” We cannot determine from the record whether the 208 included any of the 138 replacement books that Appellant had delivered to SRS in late October and early November 2002, or if they were an entirely new group of books. Barring unforeseen or unusual circumstances, none of which were set forth in this record, quality assurance checks on the 138 replacement books should have occurred quickly, certainly within a week or two of receipt. Based upon this record, specifically GPO’s failure to raise quality assurance problems associated with the 138 replacement books in a timely fashion, we find that the 138 books were accepted well in advance of the January 29, 2003 notice and the June 18, 2003 partial termination for default. *See generally Henry Angelo & Co., Inc.*, ASBCA No. 30502, 87-1 BCA ¶ 19,619; *Gavco Corporation*, ASBCA Nos. 29763, 30935, 32708, 88-3 BCA ¶ 21,095 at 106,500.

It is well established that the Government bears the burden of proof in establishing the validity of a default termination. *See McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1329 (Fed. Cir. 1999). The parties have elected to proceed pursuant to Board Rule 11 which allows for submission of an appeal for decision on the record without a hearing. We regularly advise those appearing before the Board that submission of a case without a hearing “does not relieve the parties of the necessity of proving the facts supporting their allegations or defenses.” *Sefco Constructors*, VABCA No. 2747 *et al.*, 93-1 BCA ¶ 25458. In this matter, the GPO has failed to provide evidence that the 208 books complained of in January 2003 had not already been accepted under the Contract, with the resultant limitations on Government’s right to terminate for default. In short, the Government has failed to meet its initial burden of proving a default that could

legally justify a partial termination under the GPO's Default Clause. See *Lisbon Contractor, Inc., v. United States*, 829 F.2d 759, 764 (Fed. Cir. 1987).

We also find no merit in GPO's argument that "Appellant's history of inadequate and rejected performance . . . [its] admission that it did not follow the reprint order, and the fact that the repaired books did not meet the Contract size specifications, tolled the expiration of the warranty period so that CO's final decision was made within the time limits set forth in the Contract's Warranty Clause." This Board previously has rejected parties' attempts to "morph" default actions into warranty claims where, as is the case here, there has been no properly asserted warranty claim, *i.e.*, a Government claim that expressly has been the subject of a contracting officer's final decision. *ColorFX*, VABCA No. 7206 GPO, 05-1 BCA ¶32,831. In *ColorFX*, the GPO conceded that a default termination was improper, because it occurred after acceptance of the product, but averred that the action could still go forward under the contract's warranty clause. We rejected that argument because, as in this case, the final decision in *ColorFX* had nothing to do with the assertion of a warranty claim.

Since we have overturned the default termination, the GPO's assessment against Appellant of \$44,900.00 for excess procurement costs is without legal basis and must be set aside. *Marine Construction & Dredging, Inc.*, ASBCA Nos. 38,412 *et al.*, 95-1 BCA ¶ 27,286; *Maitland Bros. Company*, ASBCA Nos. 30089 *et al.*, 90-1 BCA ¶ 22,367; *Oklahoma Aerotronics, Inc.*, ASBCA Nos. 25605 *et al.*, 87-2 BCA ¶ 19,917; *Lear Siegler, Inc.*, ASBCA Nos. 32587 *et al.*, 87-2 BCA ¶ 19,749; GPO CONTRACT TERMS, Contract Clause, ¶ 20 (f), GPO Publication 310.2 (Rev. 5-99).

DECISION

For the foregoing reasons, the appeal of White Tiger Graphics, Inc., under U.S. Government Printing Office Purchase Order No. F 7163, VABCA-7208GPO, is **SUSTAINED**. The Contracting Officer's partial termination for default is converted to a termination for convenience of the Government; the assessment of excess reprourement costs is without legal basis and is set aside.

Date: June 22, 2005

PATRICIA J. SHERIDAN
Administrative Judge
Panel Chair

We Concur:

RICHARD W. KREMPASKY
Administrative Judge

RICHARD C. WALTERS
Administrative Judge